

Appointment of Independent Counsel – Review

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I have been retained by the Manitoba Department of Justice to review the Department's policy on the appointment of independent counsel in its entirety and specifically to:

- a) compare Manitoba's policy to that in other provinces;
- b) identify any gaps in the policy; and
- c) make suggestions as may be appropriate to improve the policy.

I am pleased to advise that I have completed that review.

MANITOBA'S INDEPENDENT PROSECUTOR POLICY

Manitoba's independent prosecutor policy has been reduced to writing, the most recent version of which takes the form of a policy directive dated January, 2005. That policy directive is attached to this Report. It is publicly available on the internet at: <http://www.gov.mb.ca/justice/prosecutions>.

The policy directive itself states the object of Manitoba's independent prosecutor policy as follows:

“...to ensure confidence in the justice process by providing for the appointment of independent counsel in those situations where a reasonable person would perceive that an accused person may receive differential treatment because of his/her relationship with Manitoba Justice. The likelihood of such a perception is determined, in large part, by the closeness of the relationship between the accused and the Department. The nature of the alleged offence may also be a secondary factor.”

Briefly, the policy provides that public prosecutions at the instance of the province are normally to be conducted by the province's crown attorneys. However, it acknowledges that there are some cases which, if prosecuted by the province's crown attorneys, might give rise to inappropriate public perceptions and raise issues of public confidence. In those circumstances, prosecution by counsel who is independent of the province is required.

The policy directive particularizes the circumstances in which public concerns might be raised by the decision to have the province's crown attorneys take on the role of prosecutor and provides:

- a) whenever a criminal charge is considered against a person who is directly connected to the justice system, the prosecution is to be conducted by independent counsel;
- b) whenever a criminal charge is considered against an employee of Manitoba Justice not directly involved in the court process or against a close relative of a person directly connected to the justice system, the appointment of independent counsel is to be considered depending on the seriousness and notoriety of the allegations and the degree of connection of the person charged to the justice system;
- c) where there is no obvious connection to the justice system but a crown attorney, after consultation, believes that a reasonable person may perceive that the accused could receive differential treatment, the appointment of independent counsel is to be considered.

The policy directive sets out a number of alternative approaches to the appointment that may be adopted to ensure an independent decision-making process. These are set out in ascending levels of independence from government:

- a) a crown attorney from another crown office in Manitoba may be appointed;
- b) a private practitioner from Manitoba may be appointed;
- c) a crown attorney from another province may be appointed;
- d) exceptionally, and only after conferring with the Deputy Attorney General, a private practitioner from another province may be appointed.

The policy directive sets out the following principal criteria for the selection of an independent counsel:

- Independence from government and the individuals involved in the specific case;
- Excellence in the practice of law;
- A track record for integrity; and
- Significant previous experience in either the prosecution or defense of criminal charges in the court system.

Ordinarily, decisions to appoint an independent prosecutor and decisions as to who should be appointed as the independent prosecutor are to be made by the Director of Regional Prosecutions and Education.

The terms of reference under which the independent counsel is retained are required by the policy directive to be reduced to writing and made publicly available upon request in order to ensure accountability and transparency of process.

The policy provides that advice and decisions made by an independent prosecutor are final and binding on the Department, save for the following situation. If the Department does not accept the advice and decisions of the independent prosecutor, the Minister or Deputy is required to announce publicly that the advice and/or decisions of the independent prosecutor are not being accepted. In other words, any over-ruling of the decisions of an independent prosecutor must be a public over-ruling for which the Minister will be publicly accountable.

Manitoba's policy provides that independent counsel has full access to employees within the Department of Justice and is to be guided by prosecution policies of general application within the Department.

POLICIES OF OTHER CANADIAN JURISDICTIONS

I am indebted to the staff of Manitoba Justice for obtaining this information for me. Many of the other Canadian jurisdictions do not have written independent prosecutor policies, and among those which do, the policies are sometimes not readily accessible to the public. Employees of Manitoba Justice were able quickly, through their contacts with individuals in other departments of justice across the land, to obtain information that would otherwise have been difficult, if not impossible, for me to obtain. I have not received the policies of Prince Edward Island and Quebec.

Canada – Public Prosecution Service

I am advised that Public Prosecution Service of Canada has no written policy on the subject of independent prosecutions. In practice, these issues are dealt with on a case by case basis. On occasion, counsel from other regional offices of the Public Prosecution Service of Canada conduct the prosecution of a police officer or member of the bar. On other occasions, counsel from another prosecution service has been asked to prosecute in order to ensure the independence of the prosecution function.

Newfoundland and Labrador

Newfoundland and Labrador has a succinct written policy, dated October, 2005, regarding the prosecutions of police officers, lawyers and court officials. It reads:

“Prosecutions of police officers, lawyers and court officials are to be brought to the attention of the DPP and a decision will be made on the assignment of counsel.”

New Brunswick

The government of New Brunswick web-site contains the following statement regarding the independence of the prosecution. It applies only to the prosecution of police officers:

“Crown Prosecutors will not be assigned to prosecute a case against a law enforcement officer who works in the Crown Prosecutor’s area. Likewise, Crown Prosecutors will not be assigned to handle a coroner’s inquest which may possibly result in a criminal charge being laid against a law enforcement officer who works in the Crown Prosecutor’s area.”

Nova Scotia

Nova Scotia has a written policy in respect of what it calls “Conflict of Interest”. It is available on the government web-site under the general heading “Administrative Policies”. Interestingly, the Nova Scotia policy makes no specific reference to prosecutions of police officers or court officials. The specific comments relate only to prosecutions against lawyers. The policy reads:

“Occasionally, circumstances may give rise to a conflict or the appearance of a conflict of interest for the Crown Attorney who would otherwise handle a case.

To avoid any perception that a person being investigated or prosecuted might receive different treatment because of a relationship he/she has with a particular Crown Attorney or Crown Attorneys’ Office, such cases should be brought to the attention of the Chief Crown Attorney for the Region. When a Crown Attorney brings such a case to the attention of his/her Chief Crown Attorney he/she should include any related prosecution(s). The Chief Crown Attorney for the Region will determine whether the case and any related case(s) require special handling. Cases requiring a prosecutor from outside of the region or from outside of the PPS will be referred to the Deputy Director.

Conflicts will, generally, be handled, as follows:

1. Where the accused is a Crown Attorney, the Service will utilize an out of province Crown Attorney.
2. Where the accused is an immediate family member of a Crown Attorney, the Service will utilize an out of region *per diem* Crown Attorney or an out of province Crown Attorney.
3. Where the accused is a close friend of a Crown Attorney, the Service will use an out of the local office Crown Attorney.
4. Where the accused is a member of the Public Prosecution Service, support staff or an immediate family member thereof, the Service will utilize an out of region *per diem* Crown Attorney.
5. Where the complainant/victim is a member of the Public Prosecution Service or an immediate family member thereof, the Service will utilize an out of region Crown Attorney or an out of province Crown Attorney.
6. Where the complainant/victim is a close friend of a Crown Attorney, the Service will utilize an out of the local office Crown Attorney.
7. Where the accused is a lawyer who practices little or no criminal law, the Service will utilize a Crown Attorney from the local office who does not have a personal conflict handling the case.
8. Where the accused is a lawyer who regularly practices criminal law, the Service will utilize an out of the local office or region Crown Attorney.
9. Where the accused is a lawyer who practices little or no criminal law but practices in association with a lawyer who regularly practices criminal law, the Service will utilize a Crown Attorney from the local office who does not have a personal conflict handling the case.”

Ontario

I am advised that Ontario does not have a formal written policy. The Justice Prosecutions Branch of the Crown Law Criminal Office prosecutes most of the cases against police, crown attorneys, judges, lawyers and court clerks. On occasion, those cases are prosecuted locally using a prosecutor from a neighbouring Ontario jurisdiction.

In the rare case, an out-of-Ministry prosecutor is hired to conduct these prosecutions. The decision to hire an out-of-Ministry prosecutor is based on an “appearance of justice” criteria. Factors to be considered in deciding whether to have the prosecution handled by an out-of-Ministry prosecutor are the role of the person within the Ministry and how well-known the person is.

Saskatchewan

Saskatchewan has a brief written policy and practice directive regarding allegations against and prosecutions of peace officers. The policy reads:

“Any time it becomes apparent that a police officer in Saskatchewan might become the subject of a prosecution, you are directed to refer the matter to Head Office for review and decision on the appropriateness of charges. If you receive a file regarding charges against a peace officer which have not been approved by Head Office, contact someone there immediately.

Having all potential charges referred to Head Office ensures consistency and removes any allegations of bias which might be made if decisions were in the hands of prosecutors who have worked with the officer involved. Even when another regional office handles the prosecution, having the decision made at Head Office can also help prevent any ill-feelings which might result from the decision which could affect the relationship between the prosecution office and the police force involved.”

“Head Office”, I am advised, consists of a group of senior Public Prosecutions lawyers whose roles are to do all the appellate work, provide opinions on police and conflict matters and high-risk offenders, do education updates for the crowns, policy work from a prosecutions perspective and police training. There are six crown attorneys who do this work in addition to a Director of Prosecutions and an Executive Director. For the most part, charges are determined by the Director of Prosecutions. Where charges proceed, typically a prosecutor from another Saskatchewan regional office will have conduct of the case.

Alberta

The Province of Alberta does not have a written policy. The practice, I am advised, is as follows:

- i) if a police officer is investigated for an offence, the completed investigative file is sent to another city within Alberta. Typically, if an Edmonton

police officer is investigated, the Calgary Crown office will get the file and vice versa. That office will review the file and make recommendations. If charges are laid, that office will prosecute it. Similar reciprocal arrangements are in place in the regional offices. Very occasionally, one of Alberta's Special Prosecutions crowns might be assigned to prosecute the case, but that is unusual.

ii) if an Alberta Justice employee or judge is investigated or perhaps is a material witness in a case, the file may be sent to a prosecution service in another province. The decision is made by the Assistant Deputy Minister on a case-by-case basis. Factors considered may include the need for public confidence in the decision and the reluctance of staff prosecutors to comment on the credibility of someone they know or have worked with.

British Columbia

The policies in British Columbia, like those in Manitoba, are written, extensive and aim for transparency.

The British Columbia policies are set out in four separate policy statements. They are attached in full as an attachment to this opinion and may be viewed on-line at www.ag.gov.bc.ca/public/criminal-justice/CJBPolicyManual.pdf. The following is a summary of the pertinent portions of the policies:

a) Policy regarding allegations against peace officers

The assessment of whether a charge should be laid against a peace officer must be made by either regional crown counsel or the Director, Legal Services.

If charges are approved, the following are to be considered in determining who will have conduct of the prosecution:

- whether the officer is presently, or was formerly, employed in the jurisdiction where the offence occurred and is thus known to local crown counsel;
- whether the allegation concerns an offence in the course of duty or duty-related activities, regardless of locality; and
- whether the offence is of a particularly serious nature, or has considerable public profile.

The Regional Crown Counsel is required to consider the appropriateness of requesting a crown attorney from outside the local jurisdiction to prosecute the case or of retaining *ad hoc* counsel from the private bar.

b) Policy regarding conflict of interest including prosecutions against the Crown

The general position is that local crown counsel should handle all prosecution functions, including charge assessment, unless there is a compelling reason not to do so.

However, in any case where there could be an objectively reasonable perception of conflict of interest in the Criminal Justice Branch making a charge assessment decision, the matter is referred to senior departmental personnel to decide whether to obtain an opinion on charge assessment from an *ad hoc* counsel or from crown counsel in another province or region or whether the charge assessment decision and any resulting prosecution are more appropriately within the sphere of the local crown counsel.

c) Policy regarding *ad hoc* counsel

Legal counsel in private practice (*ad hoc* counsel) are retained as prosecutors under certain circumstances. One of the itemized circumstances mentioned is that of making or advising upon charge approval decisions and prosecuting cases in respect of which a real or apprehended conflict of interest arises.

The counsel so appointed is required to

- have demonstrated competence in the practice of criminal law;
- have demonstrated sound judgment in the conduct of criminal cases;
- be recognized as a lawyer who maintains high ethical standards;
- enjoy the respect of colleagues and the judiciary;
- be recognized as a lawyer with a good work ethic;
- review and follow Branch policies relevant to the retainer; and
- have previously performed *ad hoc* duties, if any, in an efficient and competent manner.

d) Policy regarding the retainer of special prosecutors

The Assistant Deputy AG is empowered to appoint a special prosecutor in cases involving cabinet ministers or other senior public or Ministry officials, senior

police officers, or persons in close proximity to them, where the Assistant Deputy believes there is a significant potential for real or perceived improper influence in prosecutorial decision-making. The appointment is to be made from a standing list of special prosecutors from the private bar, which list is jointly approved by the President of the Law Society, the Deputy Attorney General and the Assistant Deputy AG. The joint approval process is intended to ensure that a consistent high standard is applied to those sensitive cases which are referred to the special prosecutor. Any direction given to the special prosecutor in respect of a particular matter by the Attorney General, Deputy Attorney General or Assistant Deputy Attorney General must be in writing and must be published in the *Gazette*.

COMPARISON OF POLICIES

Manitoba's policy on independent prosecutors is clearly as comprehensive and rigorous as that of any other Canadian common-law jurisdiction, and far more so than most.

Manitoba's policy, unlike many, has been reduced to writing and is available to the public on the internet.

In most jurisdictions, the department's decision making process is entirely discretionary. The policies require that cases be referred to senior personnel, but there is little or no direction as to how the senior official is to make any of the decisions associated with the appointment of counsel. Even in British Columbia, unless a police officer comes within the ambit of "high-ranking", a senior prosecution official has the discretion to decide whether the prosecution of the police officer can be dealt with by a local crown attorney or an *ad hoc* counsel.

Manitoba's policy differs from all the others in that it explicitly declares that, whenever a criminal charge is laid against a person who is directly connected to the justice system, the prosecution must be conducted by independent counsel.

Further, Manitoba's policy explicitly defines persons who come within the category of being directly connected to the justice system. The following categories are said by the directive to be directly connected to the justice system:

- judges
- crown attorneys
- police officers
- lawyers having regular business with the Department

- employees of the Department who have direct involvement with the courts or prosecutions
- Members of the Legislative Assembly, their immediate staff and family

There is no discretion left to senior Departmental officials in these circumstances.

The Manitoba policy directive contains an appendix which lists the criteria for independent counsel. First among the listed criteria is independence from government and the individuals involved in the specific case. British Columbia alone lists criteria for independent counsel, in similar terms to those used in Manitoba.

Manitoba's policy differs from that of most other jurisdictions in that it extends to situations where provincial statute offences are in issue, depending on the closeness of the accused's relationship to the Department and given the nature or severity of the offence. It also contemplates situations where the individual is not charged with an offence at all but is the victim of a crime or may be called as a material witness.

The Manitoba policy directive uniquely provides that referrals for appointment of an independent prosecutor must be made as quickly as possible because of the need to ensure that even preliminary decisions such as release on bail, adjournment of charges and disclosure to the defence are decided by independent counsel.

The Manitoba policy directive is unusual in providing that the terms of reference under which an independent counsel is retained should be reduced to writing and made publicly available upon request in order to ensure transparency and public accountability. The only equivalent provision in other jurisdictions is to be found in the B.C. special prosecutor policy.

A striking provision of the Manitoba policy directive is the clear statement that:

- c) The advice and decisions [*of the independent prosecutor*] in the cases are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General, which direction, if given, will forthwith be made public.

In British Columbia, provision is made for the prosecutions branch to obtain an opinion on charge assessment from *ad hoc* counsel or counsel from out of province, but the advice and decisions of those independent prosecutors are not said to be final and binding on the branch, and the failure or refusal of the branch to implement the advice/decision is not required to be made public. Only in the particular situation contemplated by the

appointment of a special prosecutor is this type of transparency of appointment and public accounting to be found in the British Columbia model.

The Manitoba policy has as its goal the creation of a process that is designed to ensure that, in sensitive cases, prosecution decisions are seen publicly to be made apart from government and apart from political decisions. I am satisfied that, in terms of guaranteeing the independent decision making powers of the prosecution in cases that directly involve a person who is connected to the justice system, the Manitoba policy is not only the equivalent of that applied in other jurisdictions, but is more rigorous than that of the other jurisdictions with which a comparison has been made. That guarantee of independent decision making powers of the prosecution is accomplished in large measure by limiting the discretion vested in its crown office and by the mandated transparency of the relationship between Manitoba and its independent prosecutors.

GAPS AND SUGGESTIONS

Arising from the review of the policies of other jurisdictions

A review of the policies of the other jurisdiction discloses little in the way of gaps in Manitoba's policy. A comparison with the British Columbia *ad hoc* system discloses no gaps in Manitoba's policy. To the contrary, the Manitoba policy is more transparent and less discretionary than is the B.C. *ad hoc* policy.

British Columbia, in addition to its *ad hoc* prosecutor system, has instituted a distinct policy with respect to the prosecutions of cases involving cabinet ministers and other senior public or Ministry officials, senior police officers, or persons in close proximity to them, described by the B.C. documents as being "high ranking figures". Manitoba has no separate policy in respect of high ranking figures. However, when one compares the transparency of Manitoba's independent prosecutor system with that of the special prosecutor system in British Columbia, there is nothing to distinguish the two.

Aside from the question of transparency, the following features distinguish the special prosecutor process of British Columbia from the independent prosecutor process of Manitoba.

- a) in the case of a special prosecutor, that prosecutor is required to come from a list of senior and experienced practitioners from the private bar of the province. The Manitoba policy would theoretically permit a crown attorney from another region in the province to be appointed, but would also permit an appointment from the private bar of the province or from the ranks of an out-of-province crown attorney or private practitioner; and

b) the approval of the President of the Law Society to the inclusion of a counsel on the special prosecutors list is required. No such outside input is present in the selection of independent prosecutors in Manitoba. However, it is highly unlikely that the President of the Law Society of Manitoba would be able to comment on the qualifications of out-of-province crowns or practitioners.

Manitoba, fortunately, has not recently had experience with prosecution decisions having to be made in respect of "high-ranking figures". I am not convinced that a separate policy is necessary, given the transparency of our basic independent prosecutor system. Nor do I consider it to be necessary to amass and keep current a list of local private practitioners who could be called upon as prosecutors in the event of such a prosecution being required. It is highly unlikely that the prosecutor appointed in that type of situation would be local. The inclusion within the existing Manitoba policy of the list of prosecutors in ascending order of independence is sufficient to ensure that, if such a prosecution were to arise, Manitoba could and would distance itself.

Arising from my discussions about the Manitoba policy with persons who have worked with the existing policy.

- (i) The Manitoba policy requires, for sound reasons, that an independent prosecutor be bound by any Departmental policies of general application relevant to the retainer. Manitoba is certainly not alone among the jurisdictions surveyed in including that requirement. The alternative would be untenable. Unless independent counsel are kept informed of Departmental policies, this requirement may not be met by them.

I would recommend that the policy provide, together with the retainer letter, that the independent counsel be referred to any Departmental policies that reasonably appear at the outset to be applicable to the particular retainer.

- (ii) The Manitoba policy now provides that the independent prosecutor has full access to all employees of the Department of Justice. There may be any number of good reasons why an independent prosecutor may reasonably wish to have on-going access to employees within the Department, access which does not diminish the independent decision-making function of the independent prosecutor. I note the following examples of such instances, but these examples are in no way intended to be exhaustive of situations in which access might reasonably be sought.

Independent prosecutors are, from time to time, called upon to prosecute cases that require a degree of expertise possessed by departmental prosecutors, prosecutorial expertise not always available within the private bar and not always possessed by a private practitioner. That expertise may relate to prosecutions in a particular field such as youth crime, domestic violence or commercial crime. It may relate to questions of local practice or best prosecutorial practices. Consultation between independent prosecutors and departmental prosecutors is to be encouraged provided that the independent decision-making role of the independent prosecutor is always recognized and respected.

Independent prosecutors, particularly those from outside the jurisdiction, may reasonably require the assistance of departmental prosecutors to attend to administrative or preliminary tasks on their behalf.

In the interests of transparency, I would recommend that the policy more fully describe what is intended by the existing provision that the independent prosecutor is to have full access to all employees within the Department of Justice. Should the independent prosecutor choose to avail him or herself of that on-going right of access, the policy should emphasize that the ultimate decision-making authority rests with the independent prosecutor.

In order to ensure that all concerned understand the requirement of independent decision-making throughout, I recommend that the Director of Regional Prosecutions and Education, facilitate contact between the independent prosecutor and departmental crown attorneys.

- (iii) While the current policy makes reference to all counsel adhering to Departmental policies, it is silent as to the position of independent counsel vis-à-vis constitutional law positions and the Constitutional Law Branch of the Department. I am concerned lest different agents of the Attorney General publicly take different, perhaps incompatible, positions on the requirements of the Constitution. I am advised that there is inconsistency of practice among independent counsel on the issue of consultation with the Constitutional Law Branch. I recommend that the policy include a requirement that independent counsel consult with the Constitutional Law Branch on issues of constitutional law, should they arise in a particular case.

- (iv) I understand that the Victim's Bill of Rights legislation imposes certain obligations on departmental prosecutors. I am advised that there is inconsistency in the practice of independent prosecutors with respect to Victim Services. I recommend that the independent prosecutor policy make explicit that independent prosecutors are subject to the same legislative obligations under the Victim's Bill of Rights as are departmental prosecutors.
- (v) I understand that independent prosecutors meet periodically with the Director of Regional Prosecutions and Education to brief the Department on the progress of referrals, principally to assure the Department that none of the referrals are being neglected. That type of administrative meeting at the call of the Department is necessary and reasonable and in no way diminishes the independence of the prosecutor. However, the policy should acknowledge the fact of these meetings and state their administrative purpose in order that they are not misconstrued.

CONCLUSION

- (a) a comparison of the Manitoba policy with that of other Canadian jurisdictions reveals that the Manitoba policy is more rigorous, transparent, and far less subject to the exercise of Departmental discretion than is the policy of any of the other jurisdictions that I examined.
- (b) that same comparison reveals no gaps in the Manitoba policy that need to be addressed.
- (c) my discussions with the individuals who implement the policy, the senior departmental crowns and the independent prosecutors, reveal certain practices that lack transparency and may therefore be misunderstood. There is an ongoing relationship between the department of justice and the independent prosecutor following the appointment. That relationship is reasonable and necessary. It exists for administrative, practical and consultative purposes and does not detract from the independence of the prosecutor. I recommend that the policy be amended to address and clarify the relationship between the independent prosecutors and the department in the post-appointment period.
- (d) my discussions with the independent prosecutors revealed substantial differences in their approach to the constitutional law and victims services branches of the Department of Justice. I recommend that the relationship between

independent prosecutors and those branches be clarified and made explicit in the policy.

POLICY STATEMENT:

Public prosecutions commenced at the instance of the Province of Manitoba are normally conducted by the Province's Crown Attorneys. This cadre of Crown Attorneys is amongst the most experienced and talented group of criminal litigators in Manitoba, and the Department of Justice is fortunate to have their services.

There are, however, some cases that, if prosecuted by the Province's Crown Attorneys, might give rise to inappropriate public perceptions and raise issues of public confidence. Most commonly, these cases involve situations where those who are involved in the administration of criminal justice in Manitoba are themselves directly involved in the case. For instance, where, following a police investigation, it is proposed that criminal charges be laid against a prosecutor or a judge, there exists the need to assure the public that decisions will be made on a principled basis, free from any sort of bias.

The purpose of this policy is to ensure confidence in the justice process by providing for the appointment of independent counsel in those situations where a reasonable person would perceive that an accused person may receive differential treatment because of his/her relationship with Manitoba Justice. The likelihood of such a perception is determined, in large part, by the closeness of the relationship between the accused and the Department. The nature of the alleged offence may also be a secondary factor. The following categories describe the circumstances in which independent counsel should be appointed, as well as the method by which that decision should be made.

1. Direct Connection to the Justice System. Whenever a criminal charge is laid against a person who is directly connected to the justice system, there may be a reasonable perception that the accused could receive some kind of differential treatment if prosecuted by a staff Crown Attorney. In all such cases, the prosecution must be conducted by independent counsel.

Persons who come within this category include judges, Crown Attorneys, police officers, lawyers involved in criminal defence work (or those having regular business with the Department), as well as employees of the Department of Justice who have direct involvement in either the court process (e.g. court clerks) or Prosecutions (e.g. support staff within Prosecutions). Members of the Legislative Assembly, and their immediate staff and family are also in this category.

For greater certainty, independent counsel must be appointed where the Department has been asked by the Commissioner of the Law Enforcement Review Agency to consider whether criminal charges should be laid following an investigation under *The Law Enforcement Review Act* respecting the conduct of a police officer.

The Assistant Deputy Attorney General has delegated the authority to appoint independent counsel to the Director of Regional Prosecutions and Education. Therefore, when a case in this category arises, the Crown Attorney is expected to refer it, as soon as possible, to the Director of Regional Prosecutions and Education for the appointment of independent counsel.

2. General Connection to the Justice System. This category includes employees of Manitoba Justice who are not directly involved in the court process and, in addition, close relatives of a person with a direct connection to the justice system (provided the Crown is aware of this relationship). In these cases, independent counsel will often be appointed. However, in order to require the appointment of independent counsel, the connection of the accused to the justice system must be more than trivial. In making this judgment, consideration should also be given to the seriousness and notoriety of the alleged offence.

In cases where the accused has a general connection to the justice system, the Crown Attorney is expected to refer the case as soon as possible to the Director of Regional Prosecutions and Education along with a recommendation as to whether independent counsel should be appointed. The Director of Regional Prosecutions and Education will determine whether the circumstances warrant prosecution by a staff Crown Attorney or outside independent counsel.

3. No Obvious Connection to the Justice System. In the vast majority of cases, there will be no connection between the accused and the justice system. These cases should generally be prosecuted by staff Crown Attorneys. However, there may be unusual circumstances where facts come to light that suggest that independent counsel is appropriate. Crown Attorneys must be alert to situations where a reasonable person may perceive that the accused could receive differential treatment because of a connection between the accused and the justice system.

If the Crown Attorney, after consultation with his/her Supervising Senior Crown, believes that an accused has a connection to the justice system that might give rise to a perception of bias, the case should be referred to the Director of Regional Prosecutions and Education for a decision as to whether independent counsel should be appointed.

Other Considerations

This Policy applies to individuals who have been charged with criminal offences. However, it may be appropriate to appoint independent counsel in cases involving provincial statute offences given the closeness of the accused's relationship to the Department and given the nature or severity of the offence. Crown Attorneys who, after consultation with their Senior Supervising Crown, are concerned about the need to appoint independent counsel in a non-criminal case should refer the matter to the Director

of Regional Prosecutions and Education for a decision as to whether independent counsel will be appointed.

It may also be appropriate to apply this Policy, where the individual is not charged with an offence but is the victim of a crime or will be called as a material witness. If the case is one in which a reasonable person would have concern about differential treatment or where the Crown Attorney is concerned that his/her decisions about the case may be influenced because of the identity of a witness or victim, the Crown Attorney should refer the case to the Director of Regional Prosecutions and Education for a decision regarding the appointment of independent counsel.

Where charges to which this Policy applies have already been laid, or an opinion is sought on whether charges are appropriate, counsel should refer the matter as soon as possible to the Director of Regional Prosecutions and Education for the appointment of independent counsel. Immediate steps are necessary to ensure that even preliminary issues such as release on bail, adjournment of the charges and disclosure to the defense are decided by the independent counsel.

Nature of Appointments

There are an infinite variety of circumstances in which it may become necessary to appoint independent counsel. In view of this, there are a number of alternative approaches that may be adopted to ensure an independent decision-making process. In ascending levels of independence from government, they are:

a) *Appointment of a Crown Attorney from within Manitoba but from another Crown Office*

In some situations, the necessary degree of independence may be achieved through this type of appointment.

b) *Appointment of a Private Practitioner from Manitoba*

Where a former Crown Attorney who has since left the Department is being considered for appointment as independent counsel, care must be taken to ensure that sufficient time has elapsed to gain a “distance” from the Department. Care must also be taken to ensure that the person selected has not had any previous dealings with the alleged offender.

c) *Appointment of a Crown Attorney from Another Province*

Informal protocols exist between this Department and many other provinces and territories to facilitate the appointment of a Crown Attorney from outside of Manitoba. This approach was judicially approved by the Alberta Court of Appeal in *Kostuch v. AG Alberta* (1995), 101 C.C.C. (3d) 321 Alta. C.A., at p. 333 (in which a Manitoba Crown Attorney was appointed to prosecute in Alberta to avoid a perceived conflict of interest in that province).

d) *Appointment of a Private Practitioner from Another Province*

This option gives maximum independence from the Department. It is also the most expensive option, given the need to travel to and from Manitoba to interview witnesses and conduct proceedings. This option should only be pursued in exceptional cases, and after conferring with the Deputy Attorney General.

Depending on the issues that arise in a particular case, it may be necessary to appoint independent counsel for only one aspect of the case (e.g. the examination or cross-examination of a specific witness).

APPENDIX TO THE POLICY

Upon determining that independent counsel should be appointed, the Director of Regional Prosecutions and Education will proceed to make the appointment. While individual Crown Attorneys may have relatively little involvement at this stage, it is important that the process should be as transparent as possible and it is useful for Crown Attorneys to be aware of the process.

The Process of Appointment

The principal criteria for the selection of an independent counsel are:

- independence from government and the individuals involved in the specific case;
- excellence in the practice of law;
- a track record for integrity; and
- significant previous experience in either the prosecution or defense of criminal charges in the court system.

In some cases, the Director of Regional Prosecutions and Education will consult with the Assistant Deputy Attorney General and/or the Deputy Attorney General before making a final decision. *Ad hoc* appointments will usually be appropriate as individual cases arise. In matters arising under *The Law Enforcement Review Act*, a standing appointment of the independent counsel will be made to facilitate referrals from the Commissioner of the Law Enforcement Review Agency directly to the independent counsel.

Terms and Conditions of Appointment

Where a lawyer from outside the Department is retained to act as an independent counsel, the terms of reference under which the independent counsel is retained should be reduced to writing and made publicly available upon request in order to ensure a transparent process and public accountability. A copy of this Policy Statement must also be provided to the independent counsel once retained, and be made available to the public on request.

Absent exceptional circumstances, the following should generally form a part of the terms of reference:

- a) The retainer agreement, including the terms of reference and any subsequent amendments, are publicly available on request;
- b) Where a legal opinion is sought, the precise question(s) for which the advice is being sought, and the person to whom it should be provided;

- c) The advice and decisions in the case are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General, which direction, if given, will forthwith be made public;
- d) The independent counsel has full access to all employees within, and all documents and information held by the Department of Justice for the Province of Manitoba;
- e) The independent counsel is to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba, which apply to all provincial prosecutions throughout the province. This includes, for instance, the charge approval standard (see: Crown Policy on Laying and Staying of Charges), disclosure policies as well as directives from the Attorney General on the position to be taken in cases of gang-related crime, violent crime, child victims, etc.
- f) In many cases, it will be appropriate to include in the terms of reference a statement to the effect that advice is also being sought on the extent to which information concerning the case, including the opinion sought, should be made available to the public. This will be especially important where the case has attracted considerable public attention and scrutiny.



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL
CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 1070-00	EFFECTIVE DATE: November 18, 2005	POLICY CODE: ADH 1
SUBJECT: Ad Hoc Counsel		CROSS-REFERENCE: SPE 1 STA 1

POLICY

Legal counsel in private practice (ad hoc counsel) are retained on an ad hoc basis under various circumstances, most notably:

1. To provide Crown Counsel services when no employee Crown Counsel is available.
2. To make, or advise upon, charge approval decisions and to prosecute cases in respect of which a real or apprehended conflict of interest arises.
3. To allow the Branch, in exceptional circumstances, to benefit from the particular expertise, skill, or knowledge of members of the defence bar in specialized areas or sensitive matters.

The provisions concerning the need to avoid conflict of interest in exercising a prosecutorial function, in the Branch policy entitled "Standards of Conduct – Conflict of Interest" STA 1, apply to ad hoc counsel in their role as Crown Counsel.

DISCUSSION

Eligibility

1. Counsel must have the authority to practice law in British Columbia under the *Legal Profession Act*.
2. In determining whether to retain an ad hoc counsel, Administrative Crown Counsel must have confidence in the skills, abilities, and judgment of ad hoc counsel and be satisfied that ad hoc counsel has appropriate knowledge of the criminal law, procedure and Branch policy.
3. Ad hoc counsel should have experience in criminal cases which corresponds to the

duties for which they are retained.

Criteria for Selecting Ad Hoc Counsel

1. Demonstrated competence in the practice of criminal law which includes a good working knowledge of substantive law and procedures as well as demonstrated ability in the conduct of trials, examination and cross-examination of witnesses, making of legal arguments and submissions, and speaking to sentence.
2. Demonstrated sound judgment in the conduct of criminal cases, e.g., making tactical decisions in the course of a trial, recognizing the strengths and weaknesses in any particular case.
3. Recognized as a lawyer who maintains high ethical standards.
4. Enjoys the respect of colleagues and the judiciary.
5. Recognized as a lawyer with a good work ethic.
6. Will review and follow Branch policies relevant to the retainer.
7. Has performed previous ad hoc duties, if any, in an efficient and competent manner.

Ad Hoc Counsel Appointments - Considerations

1. The criminal bar is a relatively small one. It is generally well known amongst members of the defence bar that the Criminal Justice Branch retains ad hoc Crown Counsel from time to time. Similarly, Administrative Crown Counsel are generally aware of those lawyers who are interested and qualified.
2. Any qualified lawyer in private practice who wishes to perform ad hoc counsel work should inform Administrative Crown Counsel of their interest.
3. There are ad hoc counsel whose performance is of such high calibre that Administrative Crown Counsel will select them whenever they are available. In addition, some lawyers are more willing to travel to the work, so they may be retained more frequently.
4. In many smaller communities, primarily outside the Lower Mainland, there may be few qualified counsel willing to perform ad hoc counsel responsibilities, which results in only a limited number of lawyers being retained on a recurring basis.
5. In addition to special prosecutions for which only the Assistant Deputy Attorney General has authority to appoint under the *Crown Counsel Act*, some cases require very experienced and talented senior ad hoc counsel to be assigned (for example,

where there is a conflict or unavailability of senior employee Crown Counsel). Regional Crown Counsel retain the flexibility in these cases to retain a lawyer in whom they have the utmost confidence in their ability to do a good job in difficult circumstances. The number of qualified lawyers in this category is necessarily limited.

The procedure for retaining ad hoc counsel and use of standard retainer letters and billing guide is described in a Management Services Bulletin entitled "Ad Hoc Retainer Process", a copy of which is available from Managers of Administrative Services.



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL
CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 55820-15	EFFECTIVE DATE: November 18, 2005	POLICY CODE: POL 1
SUBJECT: Police – Allegations Against Peace Officers		CROSS-REFERENCE: ADH 1 CON 1 DIS 1 LEG 1

POLICY

In order to ensure that there is no perception of a conflict of interest and to maintain public confidence in the administration of criminal justice, the charge assessment decision on an allegation against a peace officer must be made by either Regional Crown Counsel or the Director, Legal Services.

Regional Crown Counsel should make the charge assessment decision unless concerned that there could be an objectively reasonable perception of a conflict of interest or that the maintenance of public confidence in the administration of justice requires that the decision should be made at Headquarters. In either case, the matter should be referred to the Director, Legal Services for a charge assessment decision, pursuant to the procedure set out below.

PROCEDURE

When a Report to Crown Counsel is received containing allegations that a peace officer has committed a criminal offence, regardless of whether the offence allegedly occurred in the course of duty or not, the following procedure is to be followed:

1. The Report to Crown Counsel should be forwarded to the Administrative Crown Counsel in the location where the offence allegedly occurred.
2. The Administrative Crown Counsel should forward the file to Regional Crown Counsel.
3. Regional Crown Counsel should review the file and make the charge assessment decision, unless the matter is referred to the Director, Legal Services for one of the reasons described above. In that case, the file should be accompanied by a memorandum containing a brief recital of the relevant facts sufficient to carry out an assessment without reference to the police file. Regional Crown Counsel should

include a recommendation for the consideration of the Director, Legal Services, unless the referral was made because of a concern about conflict of interest. The following headings should be used:

RE:	Accused	Alleged Offence:
	Complainant:	Offence Date
	Region:	Offence Location:
	RCC Completion Date:	On or Off Duty:
	Recommendation:	

4. The Director, Legal Services will make a decision with respect to laying a charge and communicate that decision to Regional Crown Counsel. If there is any difference between a recommendation of Regional Crown Counsel and the decision of the Director, Legal Services, the matter will be referred to the Assistant Deputy Attorney General.
5. The final decision should be communicated to Administrative Crown Counsel who should notify the police.
6. When Regional Crown Counsel makes the charge assessment decision, a report should be sent to the Director, Legal Services.
7. If criminal charges are approved, Crown Counsel should be designated by Regional Crown Counsel, on consideration of the following:
 - (i) whether the officer is presently, or was formerly, employed in the jurisdiction where the offence occurred and is thus known to local Crown Counsel;
 - (ii) whether the allegation concerns an offence in the course of duty or duty-related activities, regardless of locality; and
 - (iii) whether the offence is of a particularly serious nature, or has considerable public profile.

Regional Crown Counsel should consider the appropriateness of requesting Crown Counsel from outside the local jurisdiction to prosecute the case, or retaining ad hoc counsel from the private bar (see ADH 1).
8. Where there is an allegation that the actions of a peace officer have caused the death of another person, the Director, Legal Services will provide a copy of the material to the Assistant Deputy Attorney General.

Should Crown Counsel be aware that a police agency has conducted an internal investigation related to the circumstances of a prosecution being conducted by Crown Counsel, all information, including witness statements, compiled by the internal investigation should be obtained. Any information obtained from the internal investigation that is relevant to the related case should be disclosed to the defence as soon as possible (see DIS 1).

When there is an allegation of misconduct against a peace officer by any individual, the complainant should be referred to the appropriate police detachment. Where an allegation of apparent substance first arises during a court proceeding, Crown Counsel should recommend to the appropriate police agency that an investigation into the misconduct be undertaken.



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL
CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 55100-00	EFFECTIVE DATE: September 15, 2004	POLICY CODE: CON 1
SUBJECT: Conflict of Interest – Including Prosecutions Against the Crown (R. v. R.)		CROSS-REFERENCE: SPE 1 STA 1

Policy

Generally, local Crown Counsel should handle all prosecution functions, including charge assessment, unless there is a compelling reason not to do so.

In any case where there could be an objectively reasonable perception of a conflict of interest in the Criminal Justice Branch making a charge assessment decision, the matter should be referred to Regional Crown Counsel who may consult with the Assistant Deputy Attorney General in deciding:

- a) whether to obtain an opinion on charge assessment from ad hoc counsel or from Crown Counsel in another province or region; and
- b) whether it would be appropriate for local Crown Counsel to review the aforementioned opinion, conclude a charge assessment decision, and then handle any prosecution which may result.

Discussion

This policy has application where there could be a perception of a conflict of interest in the Criminal Justice Branch making a charge assessment decision because the potential accused is an agency of government (R. v. R.) or there is some connection between the potential accused and the Criminal Justice Branch, and the case falls short of the need for a special prosecutor (see SPE 1).



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL
CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 125-20/CCAC	EFFECTIVE DATE: November 18, 2005	POLICY CODE: SPE 1
SUBJECT: Special Prosecutors		CROSS-REFERENCE: CHA 1 PRO 1

Policy

The Assistant Deputy Attorney General (ADAG) is empowered to appoint a special prosecutor in cases where the ADAG believes there is a significant potential for real or perceived improper influence in prosecutorial decision-making.

Above all other considerations, the ADAG regards the need to maintain public confidence in the administration of criminal justice as the paramount consideration in deciding whether a case requires the appointment of a special prosecutor.

Any case which Crown Counsel believes warrants consideration of the appointment of a special prosecutor, and any request for the appointment of a special prosecutor received from members of the public or the police, should be referred immediately to Regional Crown Counsel who will discuss the matter with the ADAG.

Discussion

On June 27, 1991, the *Crown Counsel Act* received Royal Assent and came into force. The *Crown Counsel Act* was the culmination of a process which commenced in November 1990 when Commissioner Stephen Owen submitted his Discretion to Prosecute Inquiry Report to government. Commissioner Owen concluded that while criminal justice in British Columbia is administered with integrity, professionalism and public confidence, nevertheless the system itself was vulnerable. Owen then recommended a process to allow for the appointment of special prosecutors to strengthen the independence of prosecutorial decision-making from real or perceived improper influence.

With the passing of the *Crown Counsel Act*, legislation was enacted to provide a more open justice system, one which balanced the need for Branch independence with accountability to the public and the legislature through the Attorney General. For the first time, the function and responsibilities of the Criminal Justice Branch and the roles of the Assistant Deputy Attorney General (ADAG) and Crown Counsel were clearly defined and legislation governed the relationship between the Criminal Justice Branch and the Attorney General.

Under section 5 of the *Crown Counsel Act*, the Attorney General (AG) or Deputy Attorney General (DAG) can intervene to direct the ADAG with respect to a specific prosecution or appeal only if such direction is in writing and is published in the *British Columbia Gazette*. Similarly, under section 6, a directive from the AG or DAG concerning Criminal Justice Branch policy on approval or conduct of prosecutions must be given in writing to the ADAG who has a discretion to require publication of the direction in the *Gazette*. Similar provisions exist with respect to directives relating to the Branch's administration.

Yet even with all these safeguards, cases can arise in which the public may still question the integrity of prosecutorial decision-making. For cases in which the ADAG forms the view that there could be significant potential for real or perceived improper influence in the administration of criminal justice, section 7 of the *Crown Counsel Act* authorizes the ADAG to appoint a lawyer from the private Bar as a special prosecutor to carry out a defined mandate with respect to the approval and conduct of a specific prosecution.

Under section 7(4) of the *Crown Counsel Act*, if the AG or DAG or ADAG gives a direction to a special prosecutor in respect of any matter within the mandate of the special prosecutor, that direction must be given in writing and be published in the *Gazette*.

Appointment of Special Prosecutors

Special prosecutors are appointed on a case-by-case basis by the ADAG from a list of senior and experienced practitioners from the private Bar. Most special prosecutors are appointed in cases involving Cabinet Ministers and other senior public or Ministry officials, senior police officers, or persons in close proximity to them. Only the ADAG has the authority, under the Act, to appoint a special prosecutor. All counsel on the special prosecutors list have been jointly approved by the President of the Law Society, the DAG and the ADAG. This joint approval process ensures a consistent high standard is applied to those sensitive cases which are referred to the special prosecutor.

Functions of Special Prosecutors

Applying Branch policies, including the policy on Charge Assessments Guidelines (CHA 1), special prosecutors carry out the charge assessment and, where there is a decision to prosecute, are ordinarily responsible for the conduct of the ensuing prosecution and any subsequent appeal. Special prosecutors also make the decision as to whether to notify professional organizations, employers or other groups that charges against their members or employees have been proposed in a Report to Crown Counsel, pursuant to the policy entitled Professional Organizations – Charges Against Members (PRO 1). (Any notification will be done by the Headquarters Office).

The Branch facilitates responses to the media or other interested parties concerning decisions made by special prosecutors.